Supreme Court, U.S.
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No. 91-1880

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO, DEPARTMENT OF LIQUOR CONTROL,
Petitioner,

v.

BROOKPARK ENTERTAINMENT, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF OF BEECHCREST CENTER, INC., AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A LOCAL OPTION ELECTION, DIRECTED AT A SPECIFIC PREMISES, IS CONSTITUTIONAL, WHERE, AS A CONDITION PRECEDENT TO SUCH ELECTION, THE BUSINESS, AFTER NOTICE AND HEARING, HAS BEEN FOUND BY THE STATE LIQUOR CONTROL COMMISSION TO HAVE VIOLATED THE STATE'S LIQUOR CONTROL LAW.

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REPLY ARGUMENT IN SUPPORT OF GRANTING WRIT OF CERTIORARI

Respondent, Brookpark Entertainment, Inc., has not filed a reply brief, but instead has filed a letter with the Clerk waiving their right to respond. In that letter, respondent gratuitously argues the worthiness of the present petition on the ground that petitioner did not appear in oral argument before the Court below. The case started as a challenge to an election and in the Court below, the Ohio Secretary of State presented constitutional arguments as to its validity. Presumably because the election has long since been held and this case deals only with the collateral consequences of that election, the Secretary of State is not a party to the petition. Petitioner, however, still has a most viable interest in whether cancellation of the liquor license, commanded by that election, is required or not.

In place of a brief by respondent, Beechcrest Center, Inc. has filed a brief in opposition to the petition as an amicus curiae. Petitioner consents to the filing of the brief, amicus curiae. The brief shows that the issue in this case is not isolated. The brief also demonstrates the tension between the due process analysis of the Court below and the State's power to enact legislation consistent with the 21st Amendment to the Constitution. The petition asks the Court to explore the boundaries of that tension.

Amicus presents several arguments why certiorari should not be granted. First, amicus argues there is no conflict with the circuits, citing to *Philly's v. Byrne,* 732 F.2d 87 (7th Cir. 1984) as not being inconsistent with the decision of the Court below. However, petitioner never argued a conflict of decisions. The Court should grant certiorari because the decision of the Court below is novel and unprecedented. What the Court below did was take arguments in *Philly's* in support of why a different option election was constitutional and convert such argument into its holding in this case why Ohio's law was unconstitutional. Certiorari is not sought because the Sixth Circuit decision is different

than some other circuits. The Court below's decision is erroneous in its own right.

Amicus next argues that other local option election schemes may not be affected by the precedent of "defining the question as the process due to prevent arbitrariness". As pointed out in the petition, it may be just as arbitrary to close all liquor establishments within a geographical area in order to shut down one establishment where there has been no showing that any of the liquor establishments have violated the law, as it is under the Ohio regulatory scheme to allow the voters to single out one of many liquor establishments, each of whom has been found to have violated the law. The precedent of "proportionality" established by the Court below, if allowed to take root, could effectively override the powers of the people, under the 21st Amendment, to regulate the sale of liquor through option elections. *Rippey v. Texas,* 193 U.S. 504 (1904).

Amicus next argues that the rule of *Bi-Metallic Investment Co. v. State Bd. of Equalization,* 239 U.S. 441 (1915), dealing with the process due under legislative enactments is not applicable. Amicus' analysis however, makes a quick transition from the general to the specific. Amicus argues that the targeted option election is the "antithesis of general legislation". However, the statutes which create the targeted local option election are general indeed, since they apply to all liquor permit holders. The specific local option election targeted for vote does not occur until after the Department of Liquor Control has held a hearing, after notice to the business, concluded that the business has previously violated the liquor laws, and the relatively difficult process of putting the matter on the ballot all have occurred. In attacking this scheme, amicus is focusing not on the specific election, but the validity of the statute itself.

Alternatively, amicus argues that even if the Ohio statutory scheme is legislative, not adjudicative, the voters no more than the legislature itself can violate the constitution. Petitioner need not quarrel with that proposition to provide a response. Amicus would have the Court believe that the

voters can pick out anyone they don't like and oust them from their license. The statute does not work that way. First, there has to be a violation found. Second, 35% of the voters must endorse putting the measure on the ballot. Third, 50% of the voters must decide to vote in favor of the option. The process itself protects against arbitrariness.

Amicus claims that the petitioner has avoided this Courts' opinion in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), by melding procedure into substance. Amicus simply doesn't accept the right of the legislature to reserve a referendum as part of the rights provided. Petitioner does not assert, as amicus may imply, that this power is unlimited, but, only that the analysis is a challenge to the legislation itself, and not the adjudicative standard of *Loudermill* utilized by the Court below.

Stripped to its essence, the decision of the Court below is nothing more than a challenge to the wisdom of the Ohio legislative formula. If states are not to be straightjacketed into one "acceptable" form of referendum, the Ohio formula should be upheld. The 21st Amendment should command more deference to the Ohio formula than evidenced by the Court below. That is the whole point of the petition and why the Court should grant the writ.

Respectfully submitted,

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